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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DARVELL POWELL, Defendant and Appellant.	B201719 (Los Angeles County Super. Ct. No. TA089234)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kevin Brown, Judge. Affirmed.

Lenore De Vita, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

Darvell Larick Powell appeals from his conviction of, corporal injury to a spouse, cohabititant, or child's parent, and a lesser offense of child abuse. Appellant contends that CALCRIM 300 improperly conveyed to the jury the defense may have an obligation to produce evidence in violation of the state and federal constitution (by instructing the jury the defense need not produce "all" relevant evidence, the jury might be left with the belief the defense is required to produced "some" evidence). We conclude that the instruction was without error. Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Darvell Larick Powell, hereinafter appellant, and Shaniqua Morrissette have a child together; D. P., who was six months old at the time of the incident. On January 25, 2007, Shaniqua, together with D. P., drove into the parking garage of her apartment complex, which she sometimes shared with appellant. Shaniqua was unable to park in her assigned tandem space because it was blocked by appellant's car. She called appellant and asked him to move his car. He arrived approximately 15 minutes later and moved his car. Shaniqua thought appellant had driven out of the parking garage. She pulled into her parking spot, took D. P. out the car, and proceeded to her apartment.

Shaniqua put D. P. in his crib, located in the master bedroom, and began getting ready for work. While changing her clothes, the doorbell rang. Shaniqua asked who it was and appellant replied in an agitated voice, "Who do you think?" She opened the door and appellant entered the apartment. Appellant was upset because he was unable to get out of the parking structure as he did not have a gate opener. The two exchanged words for a few minutes, after which time appellant punched Shaniqua in the right eye with his fist. Shaniqua did not make any physical contact with appellant before he struck her. He continued to punch her as she backed up into the apartment's bathroom. While in the bathroom, appellant continued to punch and kick Shaniqua until she broke away and ran into her bedroom.

`Once in the bedroom, Shaniqua went to the crib to get D. P. Appellant followed and pushed her into the crib, which caused the railing to crack. Shaniqua picked D. P. up

out of the crib and as she was holding D. P., appellant began punching her again. She was punched onto the bed and then fell to the floor. Shaniqua tried to shield D. P., whom she was still holding, while appellant continued to hit, kick, and stomp on her.

During the altercation, appellant told Shaniqua "you made me hit the baby." Shaniqua saw bruising on the right and left side of D. P.'s face. Appellant walked out of the bedroom and took Shaniqua's purse and keys, told her to stay put, and then left the apartment. Shaniqua stayed in her apartment for about 15 minutes before going to the manager's office to call the police.

Shaniqua had bruises to her eye, legs and head, bleeding from her mouth, and swelling on her ankles, legs, and head.

Officer Donovan Gabbedon responded to Shaniqua's domestic violence call. At the manager's office, Gabbedon met Shaniqua and D.P. Gabbedon noticed Shaniqua's bruising and swelling. He noticed red bruising on the right side of D. P.'s forehead and on the left side of his cheek. Shaniqua told Gabbedon what had happened between her and appellant. Gabbedon prepared his report based on his interview notes, supplemented by what he remembered Shaniqua telling him about the incident. The report reflects Shaniqua told Gabbedon she was carrying D. P. when she answered the door on January 25, 2007. She told Gabbedon appellant "slapped" her several times during the incident. Gabbedon's report makes no mention of any admissions appellant made regarding hurting D. P. Shaniqua did not tell Gabbedon appellant pushed her into D. P.'s crib or about the crib railing breaking during the altercation.

Officer Gabbedon was the only witness called in the defense case. Appellant did not call any witness to explain how D. P. came to have the areas of redness on his face nor did he call any witnesses to testify D. P. was not hurt in the manner claimed.

The jury found appellant guilty of corporal injury to a child's parent, in violation of Penal Code section 273.5, subdivision (a), a felony.[1] The jury found appellant not guilty of the crime of child abuse likely to produce great bodily harm in violation of section 273.5, subdivision (a), a felony charged in count 2, but found him guilty of a lesser offense, the crime of child abuse in violation of section 273a, subdivision (b), a misdemeanor.

Appellant argues by instructing the jury the defense need not produce "all" relevant evidence, the jury might be left with the belief the defense is required to produce "some" evidence. At trial, the jury was instructed with CALCRIM 300: "Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant."

DISCUSSION

Appellant challenges CALCRIM No. 300, which reads: "Neither side is required to call all witnesses who may have information about the case or to produce all evidence that might be relevant." Appellant argues that by instructing the jury that defense need not produce "all" relevant evidence, the jury might be left with the belief the defense is required to produce "some" evidence. According to appellant, the instruction permits the jury to conclude he must prove or disprove certain facts or issues and his failure to produce evidence might be seen as an admission of guilt. Respondent contends that any error regarding CALCRIM 300 was waived by the failure to object to the giving of the instructions in the trial court. Even assuming the alleged error was not waived, appellant's argument has no merit.

Appellant acknowledges that this argument was rejected in *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1190, and *People v. Anderson* (92007) 152 Cal.App.4th 919, 937-

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[1] All further undesignated statutory references are to the Penal Code.

938, but suggests that those opinions are not well reasoned and should not be followed by this court. We disagree and accept the logic and reasoning of *Ibarra* and *Anderson*.

Both cases discussed *People v. Simms* (1970) 10 Cal. App. 3d 299 (*Simms*). In *Simms*, the court approved an analogous instruction (CALJIC No. 2.11)[2] on all available evidence as a "correct statement of law." (Simms, at p. 313) The similar objection was made that the instruction could have led the jury to infer the burden of proof was to be shared by the People and the defendant. The *Simms* court said: "This contention is unsupported by any authority and we therefore are entitled to reject it on this ground. [Citations.] We observe, moreover, that the instruction is a correct statement of law and that it was proper to instruct. [Citations.]" (*Simms*, *supra*, 10 Cal.App.3d at p. 313.)

CALCRIM No. 300 is the successor instruction and tracks the language of CALJIC No. 2.11. *Ibarra* and *Anderson* concluded there was no significant difference between the instructions and there was no reasonable likelihood that the jury misunderstood CALCRIM No. 300.

Appellant contends that CALCRIM 300 contradicts the standard burden of proof instruction that defendant has no burden to present evidence or prove anything at trial. We disagree. With respect to the burden of proof, the jury was thoroughly instructed on this burden. The jury was instructed with CALCRIM 220, which states: "The fact that a criminal charge had been filed against the defendant is not evidence that the charge is true. You must not be biased against the defendant just because (he) (has) been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove each element of a crime beyond a reasonable doubt." It is clear from the instructions that the burden of proof lies with the People and that there is no requirement on the part of the defense to produce evidence to prove appellant's innocence. This was also reinforced by CALCRIM No. 355, which

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[2] CALJIC No. 2.11 read: "Neither side is required to call as witness all persons who may have been present at any of the events disclosed by the evidence . . . . Neither side is required to produce all objects or documents mentioned or suggested by the evidence." (CALJIC No. 2.11 (7th ed. 2003)

instructed the jury: "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence . . . ." We are entitled to assume that the jurors followed the court's instructions in CALCRIM 220 and 355. Both are easily understood and comprehended by the average juror. We agree that it is not reasonably probable the jury would interpret CALCRIM No. 300 as placing a burden of producing evidence on defendant in light of the other instructions given on the prosecution's burden of proof beyond a reasonable doubt. Like *Ibarra* and *Anderson*, we presume "that jurors are able to correlate, follow, and understand the court's instructions." (*Ibarra, supra,* at p. 1190.)

In evaluating a claim the jury could have misconstrued an instruction, the test on the review is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution.'" (*Anderson, supra*, 152 Cal.App.4th at p. 938, quoting *People v. Raley* (1992) 2 Cal.4th 870, 901.) In light of the burden of proof instruction given by the court, it is not reasonably likely the jury would have misunderstood CALCRIM No. 300 as appellant suggests. After reading CALCRIM 220, the average layperson would not interpret an instruction stating not "all" relevant evidence is required to be produced to mean that "some" evidence must be produced or that the defendant is derelict in not having offered any evidence.

Furthermore, in this case, prior to the start of the trial, the judge instructed the jury on the trial proceedings. The trial judge stated, "after the People present their evidence, the defense *may* present evidence, but is not required to do so. Because he is presumed innocent, the defendant does not have to prove he is not guilty." This statement also eliminates any possibility of misunderstanding. The commonsense understanding of CALCRIM 300, after hearing the direction from the judge, eliminates the possibility that a reasonable juror could interpret the instruction to mean the defense is required to produce "some" evidence. (*People v. Coddington* (2000) 23 Cal.4th 529, 594.)

DISPOSITION

The judgment is affirmed.

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COOPER, P. J.

We concur:

FLIER, J.

BIGELOW, J.